case would be of little moment. We believe, however, that it is quite usual and that it is good conveyancing, and that it was never intended to have, and should not be given, the effect which is given to it in this case.

E. N. D.

PAYMENT BY TRANSFER OF CREDIT.—Whether a payment may be effected in the absence of any act of remitting, cancelling note, or making an entry of debit and credit, is a question which recently came, for the first time, before the courts of New York, and was decided in the affirmative by a majority of the Court of Appeals. *Baldwins Bank of Penn Yan* v. *Smith,* (N. Y. 1915), 109 N. E. 138.

The defendant made a promissory note payable at a bank; the plaintiff was a holder for value, who before maturity, sent it to the bank where it was payable, for collection and remittance. On the date of maturity, the defendant, by telephone, instructed the president of the bank at which it was payable to charge the note to his account, and was told that it would be done. As a matter of fact, the bank did not debit the defendant, credit the plaintiff, cancel the note, or make remittance. A week after maturity, the bank suspended; at all times up to the suspension it had been in possession of funds to the maker's credit more than equal to the amount of the note. By the NEGOTIABLE INSTRUMENTS LAW of New York, § 147, a promissory note payable at a bank is made the equivalent of a check and in New York it is not negligence to send a bill for collection to the bank where made payable. It was held: that the plaintiff constituted the bank his agent, *Ward* v. *Smith,* 7 Wall. 447, *Cheney* v. *Libby,* 134 U. S. 68; that the acts in the case amounted to payment as between the maker and the bank where the note was payable; and that the failure of the bank to remit was imputable to the plaintiff.

Owing to the unusual situation, there are but few cases bearing upon the question, but the facts in *Moore* v. *Meyer,* 57 Ala. 20, are practically identical, and in that case a contrary decision was reached. This fact, combined with a dissenting opinion in the instant case by two of the justices, raises the stronger doubt as to the correctness of the decision. While much of the majority's reasoning was vigorously and perhaps effectively assailed, it is submitted that its conclusion can be supported along the following lines: It has been decided (provided always that there are sufficient funds to drawer's credit and at bank's disposal): (1) that if entries are made on the books of the bank, payment is complete. *Mayer* v. *Heidelbach,* 123 N. Y. 332; *Pratt* v. *Foote,* 9 N. Y. 463; *Bartley* v. *State,* 53 Neb. 310; *Wildinson* v. *Bradley,* 54 Ala. 677; (2) that if an entry of credit is made on a deposit slip, payment has been made, *Oddie* v. *First National City Bank,* 45 N. Y. 735; (3) that if a note is marked "paid," though not entered in any respect, payment has resulted. *Nineteenth Ward Bank* v. *First National Bank of South Weymouth,* 184 Mass. 49. It would seem to be but one further step to hold that under certain circumstances there may be a payment without the usual acts that denote it. If the parties have entered into a transaction wherein all the elements warranting payment are present, and their conduct evinces that it was their intention to consider the note—which in New York is equiva-

lent to a check—as paid, reason would seem to dictate that payment be thereby effected. With reference to the instant case: the bank was under an implied contract to honor the orders of its depositor up to the limit of the latter's credit; the depositor gave the order; the bank, after its receipt, acquiesced in its demand, and notified the maker that the entries would be made. Such a notification might well amount to an acknowledgment that the maker had done all within his power to appropriate his credit in payment of a debt, that the appropriation had been accepted by the bank, that the check was honored, that payment had thereby been effected, and that nothing remained to be done but the mere mechanical act of recording the payment. This manner of regarding the situation would be giving the transaction a legal effect in much the same way as the general rule pertaining to contracts seeks to have that result effectuated which was the intention of the parties. See dicta in *Oddie* v. *The First National City Bank,* supra. It would also be consistent with the practices of the credit system. One of the characteristics of the latter is that in its operation "very little was said, but very much understood." Certainly in the present case it could be said that as between the maker and the bank where made payable, it was understood that the note was paid. If this position be accepted, it follows that the majority's theory, viewing acts of entry and cancellation as evidentiary only and therefore not essential to payment, is preferable to that of the minority, holding them to be not evidentiary but constitutive in themselves of payment. The soundness of the former is indicated by a decision which the minority quoted in its own support. In *Exchange Bank of Wheeling* v. *Sutton Bank,* 78 Md. 577, it was held that where a drawee bank, to which a check has been sent for collection, was hopelessly insolvent, and did not have enough cash on hand to equal the amount of the check, yet charged the check to the account of the maker, it did not constitute payment. This would tend to show that there is nothing in a mere act of entry inherent to payment; but that other circumstances are the controlling factors. The extended list of cases which the minority cited does not conflict with the decision in question. Excepting a few that tend to support the Alabama case referred to, those cases do not treat of the question at issue. They merely decide that an actual transfer of credit on the books, or an entry on a deposit slip, or a marking "paid"—or any combination—as the case may be, does constitute payment; but not that such is necessary to payment. Dicta, even, in some of them seem to make a clear distinction between payment and an act which is evidence of payment, and would tend to reinforce the present decision. *Mayer* v. *Heidelbach,* supra; *Nineteenth Ward Bank* v. *First National Bank,* supra. If, as a last consideration, it be suggested that the defendant in the instant case had done all that could be expected of him in the usual course of business, whereas the plaintiff, in the absence of any arrival of the remittance, might have been expected to have followed up the note and urged payment before suspension, the equities would seem to have been with the defendant, and to have played an important part in the decision. Out of two possible views, that which appears to be based upon equitable consideration would seem to have the preference. T. H. W.